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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 6

(Formerly No. 103, October Term, 1960)

CHARLES BAKER, et al.,
Appellant,

vs.

JOE C. CARR, et al.,
Appellee

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF OF AUGUST SCHOLLE, AMICUS CURIAE

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INDEX

	Page
Motion for Leave to File Brief Amicus Curiae	1-4
Brief of August Scholle, Amicus Curiae	5-22
Interest of the Amicus Curiae	5
Opinions Below	5
Jurisdiction	5
Questions Presented	5
Statement	6
Summary of Argument	6-7
Argument	7-21
I. General	7
II. Malapportionment is Equally Unconstitutional in State Statutes or Constitutions	7-8
III. The Right to Relief Does Not Depend on Possible Political Remedies	9-12
IV. Gross Population Disparity Violates the Fourteenth Amendment, Irrespective of State Constitutional Provisions	12-14
V. Relief Can Only Be Expected in the Courts	14-21
Conclusion	22

INDEX TO AUTHORITIES CITED

Cases

	Page
Brown v. Board of Education, 347 U. S. 483	9
Cooper v. Aaron, 358 U. S. 1	6, 8, 9
Davis v. Schnell (SD, Ala.), 81 F. Supp. 872, aff'd per curiam (1949), 336 U. S. 933, 69 S. Ct. 749, 93 L. ed. 1093	6
Dyer v. Kazushisa Abe (D. Hawaii, 1956), 138 F. Supp. 220	13
Magraw v. Donovan (D. Minn. 1958), 159 F. Supp. 901, 163 F. Supp. 184	16
Southern Utilities Company v. Palatka, 268 U. S. 232	6, 10
United States v. Raines, 362 U. S. 17, 80 S. Ct. 519, 4 L. ed. 2d 524	6, 11
Wisconsin v. Illinois, 281 U. S. 179, 74 L. ed. 99	6, 10

Statutes

Tennessee Code Annotated, Secs. 3-101–3-107	1

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, August Scholle respectfully moves for leave to file as *amicus curiae* a brief in the above-entitled cause, and in support of such motion makes the following statement.

1. The above entitled cause involves the legality of a Tennessee legislative reapportionment act (Sections 3-101—3-107, Tenn. Code Ann.), which act, it is alleged, violates the Tennessee and federal constitutions and particularly

the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution and the United States Civil Rights Act.

2. The proposed *amicus curiae*, August Scholle, President of the Michigan AFL-CIO, is the plaintiff and appellant in a similar action on appeal to this Court from the decision of the Michigan Supreme Court, *Scholle v. Hare*, No. 22, October, 1961 Term (formerly No. 581, October, 1960 Term). Scholle has heretofore filed his Jurisdictional Statement and Brief in Opposition to Appellees' Motion to Dismiss or Affirm, together with Reply Brief to Supplemental Brief of Appellees. This Court has not acted upon said Jurisdictional Statement or Motion to Dismiss or Affirm, having neither noted the presence or absence of probable jurisdiction.

3. The mandamus petition in the Scholle case seeks a declaration of judicial invalidity of the 1952 amendments to Article 5, Sections 2 and 4 of the Michigan Constitution, pertaining to state Senate districting, on the basis of their claimed offensiveness to the equal protection and due process clauses of the United States Constitution. It is alleged that the Senate districts, as there permanently fixed, are arbitrarily and discriminatorily drawn. It is alleged that said state constitutional amendments lack *any* ascertainable or rational criteria for the establishment of the districts created. It is alleged that the amendments represent, if anything, perpetual freezing of the unconstitutionally malapportioned districts that existed at the amendments' enactment, and represent neither population, nor political units, nor area, nor any combination of these or other factors. It is alleged that the amendments effect an arbitrary and capricious classification without rational basis, effecting present vote dilution of up to 13-1 and future vote dilution of greater amounts, all contrary to the Fourteenth Amendment.

4. The Michigan case involves some issues in common with the present, Tennessee case, and the determination of this Court in this case may affect the outcome of the Michigan case.

5. The appellant in the Michigan case generally supports the positions advanced by appellants in the Tennessee case, although certain fact distinctions exist, which are argued by appellees in the Michigan case to materially distinguish the two; namely, the challenged Michigan districting is embodied in a state organic act, the Michigan Constitution (rather than in a questioned statute); and there are in Michigan, as allegedly not in Tennessee, arguably available political remedies, such as the initiative and referendum and constitutional convention.

6. August Scholle, proposed *amicus curiae*, seeks by a brief to present to this Court certain legal positions to the end that the judgment of this Court in *Baker v. Carr* (a) will be based upon positions which, if made applicable to similar issues in the Michigan case, will not be prejudicial to the Michigan appellant, and (b) will not be based upon positions which might be dispositive of issues in the Michigan case which are not before the Court in the Tennessee case.

7. While it is submitted that there is a Fourteenth Amendment violation in both the Tennessee and Michigan cases, the Michigan appellant believes that legal arguments will not be adequately presented by the parties touching upon the apportionment issues peculiar to the Michigan case. Particularly is this so insofar as suggestions have been made by the U. S. Solicitor General in the Tennessee case that an apportionment law which might otherwise by hypothesis violate the Fourteenth Amendment might not be judicially vulnerable if there were an

alternative state political remedy available for its repeal, such as an initiative, referendum or constitutional convention procedure; and that gross disparity in district population size, otherwise sufficient to offend the Fourteenth Amendment, might be excused when districting is founded on otherwise "rational" and uniform criteria. The proposed *amicus curiae* vigorously disputes these suggestions.

8. The appellants have consented to the filing of a brief *amicus curiae* by August Scholle, but the appellees have refused consent.

9. The brief which August Scholle requests to file as *amicus curiae* accompanies this motion.

Respectfully submitted,

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Dated: September, 1961.

BRIEF OF AUGUST SCHOLLE, AMICUS CURIAE

August Scholle files this brief *amicus curiae* contingent upon the Court's granting the motion for leave to file such brief, heretofore set forth.

INTEREST OF THE AMICUS CURIAE

The *amicus curiae* is the appellant in an apportionment case on appeal to this Court from the Michigan Supreme Court, being *Scholle v. Hare*, October Term, 1961, No. 22. Reference to the motion for leave to file brief *amicus curiae*, *supra*, is respectfully directed.

OPINIONS BELOW

We accept the statement of "Opinions Below" appearing in the brief for the United States as *amicus curiae*.

JURISDICTION

We accept the statement of "Jurisdiction" appearing in the brief for the United States as *amicus curiae*.

QUESTIONS PRESENTED

We accept the statement of "Questions Presented" appearing in the brief for the United States as *amicus curiae*.

STATEMENT

We accept the "Statement" appearing in the brief for the United States as *amicus curiae*.

SUMMARY OF ARGUMENT

This *amicus curiae* generally supports the position of appellants and the United States as *amicus curiae*. (I, Argument, *infra*.)

Certain qualifications, however, as advanced or inferable from the Solicitor General's arguments are questioned.

First, it is submitted—though as to this, the Solicitor General appears not to disagree—that the question of whether gross malapportionment is unconstitutional and subject to judicial correction is not dependent on whether such malapportionment results from state legislative action (or inaction) violative of a state constitution, as distinguished from state constitutional action itself. *Davis v. Schnell* (SD, Ala.), 81 F. Supp. 872, aff'd *per curiam* (1949), 336 U. S. 933 (69 S. Ct. 749, 93 L. ed. 1093); *Cooper v. Aaron*, 358 U. S. 1 (II, Argument, *infra*).

Nor may the right to relief, otherwise available, be denied because of the possibility that the offending law may later be repealed through political action. *Wisconsin v. Illinois*, 281 U. S. 179, 74 L. ed. 99; *Southern Utilities Company v. Palatka*, 268 U. S. 232; *U. S. v. Raines*, 362 U. S. 17, 80 S. Ct. 519, 4 L. ed. 2d 524 (III, Argument, *infra*).

Further, gross population disparity which otherwise violates the Fourteenth Amendment may not be excused because of state constitutional provisions authorizing such disparity, in view of the federal constitution's primacy (IV, Argument, *infra*).

Finally, because malapportionment in its very nature renders impotent the majority of the body politic, relief from its consequences can reasonably only be expected through the courts (V, Argument, *infra*).

ARGUMENT

I. General

In general, we fully support the position of the appellants and, in most respects, the positions urged by the Solicitor General of the United States as *amicus curiae*.

We especially endorse the arguments of appellants and the Solicitor General urging the substantive application of the equal protection and due process clauses to the apportionment area, and the proposed rejection of the "political question doctrine" in such area.

II. Malapportionment is Equally Unconstitutional in State Statutes or Constitutions

We are, however, concerned lest certain arguments, or arguable inferences from such arguments, advanced by the Solicitor General in an apparent effort to narrow the breadth of present decision, influence an untoward and unintended result—to restrict with undue breadth, and unnecessarily so for present purposes, the rights of persons such as the appellant in *Scholle v. Hare* and citizens similarly situated in other states.

For one thing (though we do not in fact understand the appellants or Solicitor General to argue otherwise), it is submitted that the existence of offending malapportionment in a state *statute*, as in *Baker v. Carr*, rather than in a state *constitution*, as in *Scholle v. Hare*, is not significant as a demonstrated *contra*-indication of federal rights violation in the latter instance, notwithstanding the state constitution is violated in the former case and is enforced in the latter. Inasmuch as the basis for alleged infirmity in either instance is a denial of equal protection of the laws and due process of law under the United States Constitution as the supreme law of the land, the form of objectionable state misconduct and its compliance or non-compliance with, or even embodiment in, the *state's* highest law would not be determinative of the existence or absence of *federal* violation.

> "Our people have a right, inalienable and undisputed, to equality of representation. The right is —not to be diluted or diverted. It will succumb neither to the chicanery of the crafty, nor to the apathy of those of our constitutional officers whose failure to act in accordance with its clear mandate accomplishes the 'silent gerrymander'. *Nor, indeed, is the citizens' right vulnerable to the massive power of a majority which disenfranchises through nothing less than amendment of our Constitution itself. Davis v. Schnell* (SD Ala.), 81 F. Supp. 872, affirmed *per curiam* (1949), 336 U. S. 933 (69 S. Ct. 749, 93 L. ed. 1093), *infra.*" (Dissenting opinion, Mr. Justice Smith below, 360 Mich. 1, at 51 (Jurisdictional Statement, App. A at 51.) (Emphasis added.)

And see *Cooper v. Aaron*, 358 U. S. 1.

III. The Right to Relief Does Not Depend on Possible Political Remedies

An argument made by the Solicitor General with which we must respectfully and vigorously disagree is that the presence of a judicially protected right against malapportionment, *otherwise acknowledged,* may be dependent on the absence of potential political remedies.

Such suggestion, advanced without citational support, is startling and surely erroneous, for it postulates, in effect, that that which is by hypothesis a present denial of equal protection of the laws and/or due process of law will be immune from judicial redress if arguably subject to future repeal by political means. It is an astonishing and erroneous suggestion that that which is otherwise offensive as a denial of constitutional civil rights will be held not to be so, or will be refused judicial correction, because the law might some day be changed.

The necessary and alarming implication of any such doctrine is that the typical civil rights cases, such as those concerning voting rights or segregation, which have been repeatedly and consistently acted upon in recent and earlier years by this Court, would have been decided in contrary fashion if the offending state laws were subject to repeal through the initiatory or other amendatory process. To so hold would abdicate the judicial function and leave those aggrieved, upon facts of *Brown v. Board of Education,* 347 U. S. 483, or *Cooper v. Aaron,* 358 U. S. 1, for example, to theoretical political remedies of the offending states. In a state such as Michigan, for example, which provides the initiative, referendum and constitutional convention amendatory processes, no law however otherwise offensive could ever be judicially attacked under such argu-

ment—not even that hypothesized by Mr. Justice Douglas in *South v. Peters* which would reduce "the vote of Negroes, Catholics and Jews so that each got only one-tenth of a vote."

The startling suggestion that rights otherwise judicially protected are at the mercy of only potential legislative correction is a proposition repeatedly struck down by this Court.

In *Wisconsin v. Illinois*, 281 U. S. 179, 74 L. ed. 799, an original suit in equity in this Court to enjoin water diversion by the sanitary district of Chicago and the State of Illinois, Mr. Justice Holmes wrote for the Court rejecting an argument of proposed delay pending possible congressional modification of the applicable statute:

> "These requirements as between the parties are the constitutional right of those states, subject to whatever modification they hereafter may be subjected to by Congress acting within its authority. It will be time enough to consider the scope of that authority when it is exercised. * * * *The right of the complainants to a decree is not affected by the possibility that Congress may take some action in the matter.*" (Pp. 197, 198.) (Emphasis added.)

Similarly, in *Southern Utilities Company v. Palatka*, 268 U. S. 232, the Court found no lack of mutuality in a utilities company contract with a city notwithstanding acknowledged residual authority of the legislature to regulate and modify rates and thereby relieve the municipality of its contract obligations.

> "[I]t is perfectly plain that the fact that the contract might be overruled by a higher power does not destroy its binding effect between the parties when it is left undisturbed. * * * Such a notion, logically

> carried out, would impart new and hitherto unsuspected results to the power to amend the Constitution or to exercise eminent domain." (P. 233.)

And in *U. S. v. Raines*, 362 U. S. 17, 80 S. Ct. 519, 4 L. ed. 2nd 524, sustaining a Congressional act authorizing suit by the United States Attorney General restraining discriminatory interference with the rights of Negro voters, this Court rejected an argument that relief should not be granted because "the ultimate voice of the State has not spoken, since higher echelons of authority in the state might revise the appellee's action". The Court answered:

> "It is, however, established as a fundamental proposition that every state official, high and low, is bound by the Fourteenth and Fifteenth Amendments. See *Cooper v. Aaron*, 358 U. S. 1, 16-19. We think this Court has already made it clear that it follows from this that Congress has the power to provide for the correction of the constitutional violations of every such official without regard to the presence of other authority in the State that might possibly revise their actions." (P. 25.)

Rather than looking to alternative *political* remedies to correct infringements of *legal* rights, we commend the following more reasonable, traditional and justifiable approach as suggested, in other context, in the Solicitor General's brief:

> "• • • we submit that this case should be approached, like other cases of an alleged constitutional violation, by ascertaining whether the federal courts have jurisdiction over the issue presented. If they have jurisdiction and a constitutional violation is found, then the question of a remedy should be considered. We do not think the premise can be accepted that the federal courts possess no appropriate remedy whatsoever among the broad and

> flexible equitable powers to prevent a violation of the Fourteenth Amendment from state legislative malapportionment. In other Fourteenth Amendment cases, the powers of the federal courts have not been found lacking. The fact that in this area devising a proper remedy may call for a delicate and resourceful exercise of federal judicial power does not affect the court's jurisdiction." (Pp. 40, 41, Solicitor General's brief.)

This is especially so where affirmative relief may in fact become unnecessary because of legislative deference to judicial declaration (see Solicitor General's brief, pp. 35-36), *and where delicate federal-state comity problems do not exist, as in the Michigan case, where plaintiffs have sought state court adjudication.*

IV. Gross Population Disparity Violates the Fourteenth Amendment, Irrespective of State Constitutional Provisions

We must further respectfully disagree with the suggestion of the Solicitor General that gross disparity in district populations, though otherwise constitutionally offensive under the due process and equal protection clauses, may be excused if some criterion other than population, if rational and if reasonably applied, is used as the basis for apportionment.

(Solicitor General's brief, p. 69: "If the state has a reasonable justification, even a significant disparity should not be unconstitutional.")

We find difficulty in squaring this proposition with the general argument advanced at pp. 60-66 of the Solicitor General's brief, that gross disparity of population which devalues the vote effects as much as infringement upon

voters' Fourteenth Amendment rights as does outright denial of the right to vote or the destruction of ballots cast. For, as there stated correctly by the Solicitor General:

> "[D]iscrimination between residents of a state on the basis of their geographic location is not insulated from the proscriptions of the Fourteenth Amendment."[1]

Why this is so only if the discrimination is occasioned by legislative action (or inaction) inconsistent with a state's constitution, but not if required by state constitutional provisions themselves, we fail to comprehend.

On the contrary, to accept articulated discrimination in an organic (or consistent legislative) act as permissible, while invalidating that which results from legislative action or inaction, is to ignore the premise, earlier developed, that a constitutional infirmity exists, if at all, by reason of *federal* constitutional proscriptions, which, as the supreme law of the land, are equally applicable to state constitutions and statutes.

In short, we believe the doctrine of "one man-one vote" is the basic principle to be necessarily derived from the Fourteenth Amendment and from the voting rights cases, and necessarily to be applied to all states and to all "state action". This is to deny neither the admitted substantial and proper discretion, in practice and application, left to the states in district formulation.

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[1] The point has been similarly made:

> "Any discrimination between racial and geographical discrimination is artificial and unrealistic. Both should be abolished." *Dyer v. Kazuhisa Abe* (D. Hawaii, 1956, 138 F. Supp. 220),

under organic act similar to Tennessee's. Admittedly, the *Dyer* Court in dictum suggests "geographical representation" in a "fundamental law" is permissible.

Such a rule we would hope this Court would here announce.

But at the least, we hope that as a basis for present decision it would not unnecessarily announce the converse, that is, that gross population disparity is irrelevant in the face of state-sanctioned districting on a basis other than population; and the Court might then leave to another case, squarely raising the question, consideration of state constitutions expressly authorizing districting criteria other than population.[2] Here, unhappily, the present inequality of districts on a population basis violates both the Tennessee and federal constitutions—which *is* significant to the extent that defendants in such instance may not be heard to contend a rational excuse for their action.

Here, the disparity is inexcusable—and unconstitutional.

V. Relief Can Only Be Expected in the Courts

It is vital that this Court sustain the judicial right to afford relief in instances of gross malapportionment, as in Tennessee. It is unrealistic to suggest or anticipate political correction of such maladies by a sick political system itself— whether by unrepresentative legislatures, constitutional conventions, or otherwise. Reference of the aggrieved to the unjust system of which they complain is almost a cynical disregard of their plight. Representatives of gerrymandered districts may only be expected to continue faithful representation of their distorted constituencies, and not the popular will (see cartoon opposite).

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[2] The Michigan provisions remain vulnerable, in any event, as being based on no rational, uniform, or even ascertainable criteria.

"As Your Representative, I Promise To Continue Our Fight Against Redistricting"

The all-pervasive and debilitating influences of malapportionment on the body politic which militate relief, if at all, only through the courts, has been eloquently demonstrated by Dr. William Anderson, Professor Emeritus of Political Science of the University of Minnesota, in a supplemental brief filed in *Magraw v. Donovan* (D. Minn., 1958), 159 F. Supp. 901, 163 F. Supp. 184. His words are so compelling that they bear quotation in substantial measure:

> "[W]hat are the consequences of the failure of the legislature to live up to the state and federal requirements as to equality of voting right and its refusal to accord equal representation to all the people[?]
>
> "The immediate effects are obvious in the legislature itself. There each senator and each representative has one vote, no matter how few or how many people he represents. Committee memberships and committee chairmanships are also distributed among the members without any special regard to the numbers of people they represent. The result is that legislative business is not regularly controlled by representatives of the majority of the people. Instead the members from the less populous districts have an undue influence over all legislative activity. They are conscious of their influnce and their power, and they exercise it. * * * They know, too, how to drive hard bargains on legislative issues and even on constitutional amendments, especially where area claims or county claims are involved as against state wide interests and the urban and suburban interests that represent more people.
>
> "Every observer of the work of the legislature is aware of this general tendency. It would be interesting to go through the history of attempts to bring about the equalization of the property valuations in the state * * * to allocate a larger share of road-user revenues to the counties at the expense of the shares of the state and the urban places, the

ways in which legislative requests from rural areas have been treated as compared with the treatment accorded to requests from urban and suburban places with respect to workmen's compensation, unemployment compensation, public housing, and other urban proposals. To do so, however, would require the weighing of a great deal of evidence of many kinds and that would be very tedious. Competent observers generally are so aware of the tendency toward a sort of one-sidedness, and it is so commonly conceded even by the legislators who are exercising the power that a marshalling of the evidence is hardly worth the effort.

"The effect of this situation upon the representatives from the most populous districts is naturally one of frustration, which sometimes verges on despair. With tens of thousands of constituents to represent, they find themselves unable to achieve as much as the more numerous representatives from the less populous districts. Legislation that they consider to be fair and necessary for their people in crowded urban and suburban districts is too easily blocked by those who represent far fewer people.

"The frustrations of the legislators from the more populous districts are in turn reflected back upon the constituencies, where people have become aware that because of the malapportionment of representation their wishes do not count as much as those of voters in more strategically located and less populous districts. Alert, informed, and interested citizens in the most populous areas who try to improve the legislation and administration of their state and of their local governments frequently encounter an attitude of indifference and even of hostility to their efforts. When they trace the opposition to its sources they find time and again that it centers in legislators from districts of small population that are greatly over-represented in the legislature. They find that they must first get a reappor-

tionment of representation to get a more representative legislature, and when they are blocked time and again in this effort many of them also develop a sense of frustration and 'what's the use?' This is an ominous sign of the loss of confidence in popular government; and when well-informed voters themselves become hopeless and somewhat cynical, who will there be to carry on the struggle for the preservation of American institutions?

"The effects upon the minds of young persons resulting from unethical and unconstitutional practices in high places are also worthy of mention. Anyone who has believed in and tried to convey and explain to young people the principles of popular government and constitutionalism, as I have tried to do for many years, knows what can happen in young minds when practice departs so far from principles and pretensions. Here we come to what may be the most crucial issue of all, that of constitutional morality. In state after state * * * the equal protection principle of the 14th Amendment [is] being flouted or ignored. * *

"* * * Such failure not only [illegible]les the principle of the equality of men before the law, which is so closely related to the philosophical and religious principle of the equal worth and dignity of every man by nature and before his Maker; it is in addition a deliberate breach of a sort of original compact, of a constitution adopted by the people, in which all agreed to accord to each other equality in legislative representation as well as in all other significant respects.

"This issue of constitutionalism or constitutional morality, of abiding by the constitution, cannot be brushed aside as mere idealism. It lies close to the base of all systems of popular government. These systems rest upon such basic ideas as those of mutual respect and confidence among men, and upon

keeping faith with all men in all things. When this basis is seriously undermined, and no way can be found for a peaceful and lawful correction of wrongs and the restoration of mutual confidence, the resort to force and violence is not unthinkable.

"Another apparent consequence of the failure to accord fair representation to all people within the states is * * * [that t]he loss of confidence in government may be not a total loss of confidence in all governments but only in particular governments. In a federal system such as that of the United States, the well informed citizen constantly compares the work of the different units and levels of government, national, state, and local. He forms his own judgments as to which ones are doing most and best for the public welfare and which ones have the highest standards. In a sense there is an unannounced and unpublicized yet very real and continuing competition among governments for the people's favor and respect. There is reason to believe that in the present century the states have lost ground in this competition against the national government. They lost ground because they were not sufficiently sensitive to the needs of the people. While the people were moving more and more into the urban centers and building up great cities and even greater metropolitan areas, the state legislatures were laggard in their recognition of the legislative and financial needs of such places and the people in them. Many able leaders in urban places attributed this legislative neglect to the continued rural domination over the legislature even after the majority of the people had become dwellers in cities. In any case the leaders of public opinion in the larger cities to a considerable extent gave up expecting sympathetic interest in their problems at the state capitols and turned more and more to Congress and the national administration for constructive help.

"The general result of this new trend was to begin to make subtle but very important changes in the federal system. The old balance of powers and functions between the national and state governments began to be altered and is still being altered in favor of more concentration in Washington. This tendency might have developed to some extent in any event, but real defects in state governments, sharply called to public attention by men like Theodore Roosevelt, Elihu Root, Woodrow Wilson, and other leaders, probably had much to do with the trend. Many, and I think most, of the experienced observers of public affairs in the nation honestly believe that the trend toward minority rule in state legislatures, and the disrespect for the principle of the political equality of all men, exemplified by the failure * * * to reapportion representation as required by * * * the equality principle of the 14th Amendment, lie at the root of this loss of confidence in the states, and help to explain the trend toward Washington. Recent years have seen the states making feverish efforts to regain some of the lost ground, but very few states have done anything to get at the causes of the public's loss of confidence.

"So important has this aspect of the problem become that it is receiving increasing attention on a nationwide scale. The Commission on Intergovernmental Relations established by Congress in 1953, of which I had the honor to be a member, particularly emphasized the need for a return to fair legislative apportionments as an essential step in the rehabilitation of the states. Leading organizations of citizens interested in the improvement of government in the United States, and having nothing to gain for themselves, such as The Assembly of the States, the National Municipal League, and the National League of Women Voters, have put themselves strongly on record to the same effect.

"* * * The national government is dependent upon the states for many things that concern its

own self-preservation and the welfare of the nation as a whole. This is true in the fields of elections, education, public health and welfare, local government, and many other internal public services. To have the legislatures of the states so constituted that they truly represent the people of the state as a whole, and so that the national government can deal with them in all intergovernmental relations with the assurance that they do fairly represent all the people, is a matter of no small concern.

"What the states or any of them do can have very serious effects also on the nation's international relations and its dealings with other countries, and these have recently become increasingly important. Let minority rule in state legislatures, racial and religious discriminations, and other tendencies of recent years develop much further than they have, and the pretensions of this nation to democratic leadership in the world will be seriously compromised, if they have not been so compromised already. The strength and purity of American political institutions may not seem to be seriously endangered as yet, but there are several tendencies, such as the one I have been discussing, and other developments in public morals, that will bear close watching from the point of view of the national interest. * * *"

CONCLUSION

It is respectfully submitted that the appellants in *Baker v. Carr* and the appellants similarly situated elsewhere suffer a gross denial of their constitutional rights under the Fourteenth Amendment which not only justifies, but requires, judicial intervention and protection if relief is to be known at all. This *amicus curiae* accordingly concurs in the relief prayed by the appellants.

Respectfully submitted,

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By THEODORE SACHS,
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Dated: September, 1961.